

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Amended Complaint within twenty (20) days from service hereof or a judgment may be entered against you.

Kathryn M. Herron
Deputy Attorney General

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
by D. MICHAEL FISHER,	:	
Attorney General,	:	
	:	
	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 405 M.D. 2001
	:	
	:	
SUN TOBACCO, INC.,	:	
	:	
	:	
Defendant	:	

PLAINTIFF'S FIRST AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. This is an action to enforce the Tobacco Settlement Agreement Act of 2000 (hereafter "TSAA"), 35 P.S. §5671, et seq. The TSAA was enacted by the General Assembly after Pennsylvania entered the Master Settlement Agreement (hereafter "MSA") with the nation's principal tobacco manufacturers. The purpose of the TSAA is to protect the Commonwealth and its citizens from the adverse economic and health effects resulting from cigarette smoking. A tobacco manufacturer's failure to comply with the TSAA can result in civil penalties, imposition of attorney fees and costs, and a prohibition on the sale of its cigarettes within the Commonwealth. *See* 35 P.S. §5674.

PARTIES

2. Plaintiff is the Commonwealth of Pennsylvania, by and through its Attorney General, D. Michael Fisher. It is authorized to bring this action pursuant to 35 P.S. §5674(c).

3. Defendant Sun Tobacco, Inc. (hereafter, ASun@) is a Florida corporation with a principal place of business at 6300 N.E. 19th Avenue #103, North Miami Beach, Florida, 33162. Sun manufactures cigarettes intended for sale in the United States.

JURISDICTION

4. The Court has jurisdiction over original actions brought by the Commonwealth government pursuant to 42 Pa.C.S. §761.

STATUTORY BACKGROUND

5. On November 23, 1998, leading United States tobacco product manufacturers entered into the MSA with the Commonwealth of Pennsylvania. In return for a release of past, present and certain future claims, the MSA obligates these manufacturers to pay substantial sums to the Commonwealth (tied in part to their volume of sales); to fund a national foundation devoted to educating consumers about the dangers of tobacco use; and to make substantial changes in their advertising and marketing practices and corporate culture.

6. Not every tobacco product manufacturer is a party to the MSA. Recognizing this, the General Assembly enacted the TSAA to preclude those companies that do not join from gaining a cost-advantage over the manufacturers participating in the MSA and to ensure the Commonwealth a source of funds for recovery should those manufacturers be found liable for damages caused by their cigarettes. *See* 35 P.S. §5672(6).

7. Under the TSAA, a tobacco product manufacturer that sells cigarettes after June 22, 2000, must either become a participating manufacturer in the MSA or deposit a specific amount of money into a qualified escrow fund based on Pennsylvania sales of its cigarettes. *See* 35 P.S. §5674(a). Cigarette sales are measured by excise tax collections. *See* 35 P.S. §5673.

8. Each tobacco product manufacturer required to deposit funds into a qualified escrow fund must also certify annually to the Attorney General that it has complied with that statutory provision. *See* 35 P.S. §5674(c).

FACTUAL ALLEGATIONS

9. Sun is, and has been, a “tobacco product manufacturer” as defined in section three of the TSAA because it manufactures cigarettes that it intends for sale within the United States.

10. Sun has sold and continues to sell cigarettes directly or indirectly to consumers in Pennsylvania and, accordingly, has transacted and is transacting business within the Commonwealth of Pennsylvania.

11. Sun is not a participating manufacturer in the MSA.

12. The following Sun cigarette brands were sold in Pennsylvania in 2000 and/or 2001: “Bronco” and “GT One”.

13. In the year 2000, two hundred twenty thousand two hundred (220,200) Sun brand cigarettes were sold in Pennsylvania.

14. Based on sales in the year 2000, Sun was required to deposit two thousand four hundred fifty five dollars and thirty-six cents (\$2,455.36) in a qualified escrow fund for the benefit of Pennsylvania no later than April 15, 2001. *See* 35 P.S. §5674(a)(2)(i).

15. By letter dated March 20, 2001, Sun was specifically informed of its obligation to establish a qualified escrow fund for cigarettes sold in Pennsylvania for the year 2000. Attached hereto is a true and exact copy of the letter of March 20, 2001, marked as Commonwealth's Exhibit A.

16. Sun was again notified of its outstanding obligation to timely escrow funds for the sale of cigarettes in Pennsylvania for the year 2000 in a second letter dated May 2, 2001. Attached hereto is a true and exact copy of the letter dated May 2, 2001, marked as Commonwealth's Exhibit B.

17. The Commonwealth filed an Original Complaint in this matter against Sun on August 1, 2001. The basis for the Commonwealth's Original Complaint was Sun's failure to properly escrow funds for the sale of their cigarettes in Pennsylvania for the year 2000, as required by the Act.

18. On August 7, 2001, service of the Original Complaint was effectuated upon Sun. Sun never filed a responsive pleading to the Original Complaint.

19. The parties entered into settlement negotiations in an attempt to resolve the matter. As a result of these settlement discussions, on or about November 27, 2001, Sun sent to the Commonwealth a certificate of compliance, a copy of an escrow agreement, and a check in the amount of two-thousand four hundred fifty-five dollars and thirty-six cents (\$2,455.36) for the payment of an agreed upon fine associated with Sun's failure to comply with the Act for the year 2000.

20. The documentation Sun provided on November 27, 2001, did not show that Sun had deposited into an escrow account solely for the benefit of Pennsylvania the sum required for its 2000 sales. The Commonwealth subsequently obtained information from Sun's

escrow agent, Bank of America, which showed that the escrow account which Sun had established was not “qualified” for purposes of the TSAA because the funds were commingled with escrows purportedly for other states, rather than in a separate account specifically designated for the benefit of Pennsylvania.

21. By letter dated April 15, 2002, the Commonwealth notified Sun that its escrow arrangements were absent evidence that the money designated for the Commonwealth was in a separate account. A true and exact copy of the Commonwealth’s letter of April 15, 2002, is attached hereto and marked as Commonwealth’s Exhibit C.

22. Sun has still not properly escrowed the funds relating to the sale of its cigarettes in the year 2000.

23. In the year 2001, thirty-six million eight hundred twenty six thousand six hundred (36,826,600) Sun brand cigarettes were sold in Pennsylvania.

24. Based on sales in the year 2001, Sun was required to deposit five hundred forty-nine thousand eight hundred forty-three dollars and twenty three cents (\$549,843.23) in a qualified escrow fund for the benefit of Pennsylvania no later than April 15, 2002. *See* 35 P.S. §5674(a)(2)(i).

25. By letter dated March 28, 2002, Sun was informed of its obligation to establish a qualified escrow fund for cigarettes sold in Pennsylvania for the year 2001. Attached hereto is a true and exact copy of the letter of March 28, 2002, marked as Commonwealth’s Exhibit D.

26. Sun was again notified of its outstanding obligation to timely escrow funds for the sale of cigarettes in Pennsylvania for the year 2001 in a second letter dated April 18, 2002. Attached hereto is a true and exact copy of the letter dated April 18, 2002, marked as Commonwealth’s Exhibit E.

27. Sun has not deposited any monies into a qualified escrow account for the benefit of Pennsylvania for the sale of its cigarettes in the year 2001.

28. Sun has not filed a certificate of compliance with the Attorney General in Pennsylvania for the year 2001.

29. Sun has knowingly and continuously refused to comply with the TSAA for the years 2000 and 2001.

30. Sun's refusal to comply with the provisions of the TSAA for two consecutive years constitutes two separate and knowing violations of the TSAA.

COUNT I

VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2000

31. Paragraphs 1 through 30 are incorporated herein by reference.

32. The failure of Sun to join the MSA or establish a qualified escrow fund for tobacco products it manufactured which were sold in Pennsylvania in 2000 constitutes a violation of 35 P.S. §5674.

33. A tobacco manufacturer that fails to deposit the proper amount in a qualified escrow account may be assessed a civil penalty of up to five percent of the amount improperly withheld from escrow for each day of the violation until the amount of the penalty equals one hundred percent (100%) of the original amount improperly withheld from escrow that year. *See* 35 P.S. §5674(c)(1).

WHEREFORE, the Commonwealth prays that:

a. the Court find and declare that Sun has violated the TSAA by failing either to become a participating manufacturer or to establish a qualified escrow fund in the amount of two thousand four hundred fifty five dollars and thirty-six cents (\$2,455.36) for the benefit of Pennsylvania for cigarettes sold in the year 2000;

b. the Court enter an order requiring Sun to come into compliance with the TSAA by depositing two thousand four hundred fifty five dollars and thirty-six cents (\$2,455.36) into a qualified escrow fund and filing a certificate of compliance with the Attorney General within fifteen (15) days;

c. Sun be assessed a civil penalty in the amount of two thousand four hundred fifty five dollars and thirty-six cents (\$2,455.36);

d. the Commonwealth be awarded costs and attorney fees; and

e. the Court grant such other and further relief as it believes just and equitable.

COUNT II

KNOWING VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2000

34. Paragraphs 1 through 33 are incorporated herein by reference.

35. Sun has knowingly violated Section 5674 of the TSAA by failing either to become a participating manufacturer or to deposit two thousand four hundred fifty five dollars and thirty-six cents (\$2,455.36) into a qualified escrow fund based on the sale of its products in Pennsylvania in the year 2000.

36. A tobacco manufacturer that knowingly violates the TSAA may be assessed a civil penalty of up to fifteen percent (15%) of the amount improperly withheld from escrow for each day of the violation until the amount of the penalty equals three hundred percent (300%) of the original amount improperly withheld from escrow for that year. *See* 35 P.S. §5674(c)(2).

WHEREFORE, the Commonwealth prays that:

a. the Court find and declare that Sun has knowingly violated the TSAA by failing either to become a participating manufacturer or to establish a qualified escrow fund in the amount of two thousand four hundred fifty five dollars and thirty-six cents (\$2,455.36) for the benefit of Pennsylvania for cigarettes sold in the year 2000;

b. the Court enter an order requiring Sun to come into compliance with the TSAA within fifteen (15) days by depositing two thousand four hundred fifty five dollars and thirty-six cents (\$2,455.36) into a qualified escrow fund and filing a certificate of compliance with the Attorney General.

c. Sun be assessed a civil penalty in the amount of seven thousand three hundred sixty six dollars and eight cents (\$7,366.08);

d. the Commonwealth be awarded costs and attorney fees; and

e. the Court grant such other and further relief as it believes just and equitable.

COUNT III

VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2001

37. Paragraphs 1 through 36 are incorporated herein by reference.

38. The failure of Sun to join the MSA or establish a qualified escrow fund for

tobacco products it manufactured which were sold in Pennsylvania in 2001 constitutes a violation of 35 P.S. §5674.

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that Sun has violated the TSAA by failing either to become a participating manufacturer or to establish a qualified escrow fund in the amount of five hundred forty-nine thousand eight hundred forty-three dollars and twenty three cents (\$549,843.23) for the benefit of Pennsylvania for cigarettes sold in the year 2001;
- b. the Court enter an order requiring Sun to come into compliance with the TSAA by depositing five hundred forty-nine thousand eight hundred forty-three dollars and twenty three cents (\$549,843.23) into a qualified escrow fund and filing a certificate of compliance with the Attorney General within fifteen (15) days;
- c. Sun be assessed a civil penalty in the amount of five hundred forty-nine thousand eight hundred forty-three dollars and twenty three cents (\$549,843.23);
- d. the Commonwealth be awarded costs and attorney fees; and
- e. the Court grant such other and further relief as it believes just and equitable.

COUNT IV

KNOWING VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT FOR CIGARETTES SOLD IN 2001

39. Paragraphs 1 through 38 are incorporated herein by reference.
40. Sun has knowingly violated Section 5674 of the TSAA by failing either to become a participating manufacturer or to deposit five hundred forty-nine thousand eight hundred forty-three dollars and twenty three cents (\$549,843.23) into a qualified escrow fund

based on the sale of its products in Pennsylvania in the year 2001.

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that Sun has knowingly violated the TSAA by failing either to become a participating manufacturer or to establish a qualified escrow fund in the amount of five hundred forty-nine thousand eight hundred forty-three dollars and twenty three cents (\$549,843.23) for the benefit of Pennsylvania for cigarettes sold in year 2001;
- b. the Court enter an order requiring Sun to come into compliance with the TSAA by depositing five hundred forty-nine thousand eight hundred forty-three dollars and twenty three cents (\$549,843.23) into a qualified escrow fund and filing a certificate of compliance with the Attorney General within fifteen (15) days;
- c. Sun be assessed a civil penalty in the amount of one million six hundred forty nine thousand five hundred twenty nine dollars and sixty nine cents (\$1,649,529.69);
- d. the Commonwealth be awarded costs and attorney fees; and
- e. the Court grant such other and further relief as it believes just and equitable.

COUNT V

SECOND KNOWING VIOLATION OF TOBACCO SETTLEMENT AGREEMENT ACT

41. Paragraphs 1 through 40 are incorporated herein by reference.
42. The TSAA provides that a tobacco product manufacturer that commits two knowing violations of 35 P.S. §5674(c)(2) is to be prohibited from selling cigarettes to consumers in the Commonwealth for two years. Each year that the tobacco product manufacturer fails to comply with the TSAA constitutes a separate offense. *See* 35 P.S.

§5674(c)(3).

43. Sun has knowingly violated Section 5674 of the TSAA by failing either to become a participating manufacturer or to deposit funds into a qualified escrow fund for the benefit of Pennsylvania for the years 2000 and 2001.

WHEREFORE, the Commonwealth prays that:

- a. the Court find and declare that Sun has knowingly violated the TSAA by failing either to become a participating manufacturer or to establish and fund a qualified escrow fund for the benefit of Pennsylvania;
- b. the Court enter an order prohibiting Sun from selling cigarettes through the stream of commerce to consumers within this Commonwealth for a period of two years;
- c. the Court enter an order granting the Commonwealth the right to confiscate and destroy any and all of Sun's tobacco products offered for sale in Pennsylvania for a period of two years;
- d. the Court enter an order directing Sun to give written notice to all distributors, agents and sellers of Sun's tobacco products that for two years Sun's products may not be offered for sale in the Commonwealth of Pennsylvania;
- e. the Commonwealth be awarded costs and attorney fees; and
- f. the Court grant such other and further relief as it believes just and equitable.

Respectfully submitted,

MIKE FISHER
Attorney General

BY:

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Dated: July 22, 2002

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Attorney ID #28625

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA
by D. MICHAEL FISHER,
Attorney General,

Plaintiff

v.

SUN TOBACCO, Inc.

Defendant

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: **No. M.D. 2001**
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VERIFICATION

Kenneth W. Bateman states that he is a Special Investigator for the Pennsylvania Office of Attorney General, Tobacco Enforcement Section, that he has been authorized to make this Verification on behalf of the Commonwealth, and that the statements set forth in the foregoing Complaint are true and correct to the best of his knowledge, information and belief.

These statements are made subject to the penalties of 18 Pa.C.S. Section 4904 relating to unsworn falsification to authorities.

Date:_____

KENNETH W. BATEMAN